(29)

No. 93-908

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES J. REICH,
Petitioner,

v.

MARCUS E. COLLINS AND THE GEORGIA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE DURESS FACED BY PETITIONER AND OTHER FEDERAL RETIREES WAS CONSTITUTIONALLY SIGNIFICANT.

Each and every predeprivation remedy argued by the Respondents includes the risk of criminal prosecution,[1] the risk of summary collection procedures,[2] a penalty of 25% of the tax due,[3] and an annual interest of 12%.[4] Of the four procedures claimed by the Respondents, one, declara-

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[1] O.C.G.A. § 48-7-2 (1982). *See* Brief for Petitioner, pp. 11-14.

[2] O.C.G.A. § 48-2-55, 48-2-56 (1991 & Supp. 1993). *See* Brief for Petitioner, pp. 16-17.

[3] O.C.G.A. § 48-7-86 (1982 & Supp. 1993). *See* Brief for Petitioner, pp. 14-16.

[4] O.C.G.A. § 48-2-40 (1991). *See* Brief for Petitioner, p. 16.

tory and injunctive relief, was denied Petitioner and other retirees.[5] Another, administrative review, has been described as "futile" in constitutional cases by the Georgia Supreme Court.[6] The remaining two, superior court review and the affidavit of illegality, impose the additional burden of a bond requirement equal to the amount of the tax.

Thus, to have obtained review of the tax without actually paying it to the Commissioner, a federal retiree would have first had to break the law by refusing to pay the tax when due. Next, the retiree would have had to await issuance of an assessment. From this point the retiree could have chosen to post a bond equal to the tax due and sought superior court review.[7] Alternatively, the retiree could have awaited execution, filed an affidavit of illegality, and posted a bond to obtain superior court review.[8] During the entire pendency of this process the retiree would have remained subject to criminal prosecution, the risk of summary remedies, the penalty accruing up to 25% of the tax due, and interest at 12% per year.

Further, for his last 1988 estimate which was not paid, Petitioner was subject to the immediate imposition of a lien on all property rights without the issuance of an assessment.[9] Even without execution, a lien is itself a constitutionally cognizable deprivation. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988).

Additionally, execution on this lien could have proceeded *without notice*.[10] The Respondents argue at note

[5] *See* Brief for Petitioner, pp. 17-18, 20-22.

[6] *Flint River Mills v. Henry*, 234 Ga. 385, 386, 216 S.E.2d 895, 897 (1975).

[7] O.C.G.A. § 48-2-59 (1991).

[8] O.C.G.A. § 48-3-1 (1991).

[9] *See* Brief for Petitioner, pp. 25-26.

[10] *Fowler v. Strickland*, 243 Ga. 30, 33, 252 S.E.2d 459, 461 (1979).

4 on page 19 of their brief that this was Petitioner's fault. Instead of returning the tax due but unpaid because of *Davis*,[11] Respondents claim he should have shown the income as tax exempt. (Of course, at the time, the State told retirees the tax was due but that they could file a refund claim.[12] We now know, per *Reich I*,[13] that that course of action was also "wrong.").

Even had Petitioner and other retirees shown the income as tax exempt, though, they could get no review until an assessment was issued. Once the assessment was issued, they would have been immediately subject to the imposition of a lien under O.C.G.A. § 48-2-55 (1991 & Supp. 1993).

For Georgia federal retirees, the cumulative effect of these sanctions was constitutionally significant duress. As Petitioner testified in this case:

> I was fully cognizant of the fact that failure to pay taxes on that retired pay would lead to the series of compliant steps which the Department has at its disposal by the Tax Code of the State of Georgia.
>
> I dared not, and my summary is I was not prepared to challenge the system in order to make a point on principle, because I knew that the long arm of the Department was much longer and much stronger than I.

(Reich dep., p. 41.)

Not only do these sanctions strongly deter a predeprivation challenge, the amount of tax in issue discourages any such challenge. For Petitioner, the most he will recover for any single tax year is $1,134. (Reich dep., Ex. 25.)

[11] Reich dep., Ex. 17.

[12] Thomassen dep., Ex. 2.

[13] *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992).

For all retirees who filed refund claims, the average annual claim is only $707. (Thomassen dep., Ex. 5.) Thus, for the majority of retirees, the potential criminal fine of $1,000 exceeds the amount of tax in issue.[14]

The Respondents claim that criminal prosecution was not really a risk. Brief for Respondents, pp. 34-37. While conceding that O.C.G.A. § 48-7-2 (1982) appears to impose criminal sanctions for nonpayment without regard to wilfulness, the Respondents claim that this code section was completely struck down in *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985).

Petitioner previously noted that the Georgia Supreme Court had held that the portion of the statute authorizing imprisonment was unconstitutional, but that this holding implicitly left standing the alternative criminal punishment of a fine under O.C.G.A. § 17-10-3 (1990 & Supp. 1993). Brief for Petitioner, p. 11. The Respondents now argue, however, that in *Higgins*, "the court invalidated the provision in its entirety." Brief for Respondents, p. 35.

This conclusion is simply wrong. Respondents concede that the Georgia Supreme Court has the power to sever one portion of a statute as unconstitutional, citing *Nixon v. State*, 256 Ga. 261, 264, 347 S.E.2d 592, 594 (1986). Brief for Respondents, p. 36, n.6. This is precisely what the court did in *Higgins*. It did not say that 48-7-2 was unconstitutional "in its entirety" or anything close to that. Rather, the court expressly limited its holding:

> Therefore, we agree that § 48-7-2(a)(1) is unconstitutional on state law grounds *to the extent that it authorizes imprisonment* for mere nonpayment of income taxes.

Higgins, 254 Ga. at 90, 326 S.E.2d at 730 (emphasis added).

Further, the concurrence in *Higgins* specifically noted that:

[14] O.C.G.A. § 17-10-3 (1990 & Supp. 1993). *See* Brief for Petitioner, pp. 11-12.

> [T]his case (and particularly Division 4) should not be considered as a proscription of all possible criminal sanctions for failure to pay taxes.

Id.

Thus, the court in *Higgins* went to great lengths to make the ruling as narrow as possible. To the extent that 48-7-2 authorizes a punishment other than imprisonment (i.e. a a fine) for nonpayment, it remains constitutional and valid.

The Respondents further argue that, in any event, the Petitioner did not pay his estimate due in April 1989, and that he was not prosecuted or subjected to the imposition of a lien on his property or any other summary remedy. According to the Respondents, this demonstrates that a taxpayer will not be prosecuted or otherwise subjected to sanctions for a "good faith belief" that a tax is now owed. Brief for Respondents, p. 37. This argument implies a remarkable proposition: a taxpayer's good faith belief that a tax is not owed is the legal equivalent of a U.S. Supreme Court decision squarely on point invalidating the tax. This suggestion is patently absurd.

While these facts and this argument might provide future reassurance that, whenever there is a U.S. Supreme Court decision squarely on point, Georgia taxpayers will not be prosecuted criminally if they refuse to pay the tax, Petitioner and other federal retirees did not have this assurance in April of 1989. At that time, the State took the position that, even after *Davis*, income taxes on federal retiree pay were still due and payable for tax year 1988. *See* Thomassen, Ex. 2. "[Governor] Harris Rejects Call to Suspend Taxing of Federal Retirees," *The Atlanta Journal and Constitution*, April 8, 1989, § C at 5. A retiree who sought counsel at that time would have learned that O.C.G.A. § 48-2-81 imposes an obligation on state authorities to prosecute nonpayment of taxes, and a retiree would have learned that in *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the State threatened

criminal prosecution even though there was a valid, good faith challenge to the tax.

According to the Respondents there was no duress here though because Petitioner was "never threatened with levy, attachment, garnishment or other santcions." (Brief for Respondents, p. 30.) According to their amici, the "simple existence" of summary remedies and criminal sanctions cannot constitute duress. Brief of National Governor's Assoc., *et al.*, p. 22. Under this view, a state official must articulate a specific threat. But Georgia law does not require this intermediate step before proceeding with sanctions. The first notice a criminal defendant frequently receives is when he is arrested. The only notice a taxpayer might receive of a garnishment is that his money has been taken by the state.[15] At these late stages, there is no assurance that payment would result in a dismissal of the indictment or recovery of the property taken. This Court has never held that a taxpayer must await criminal indictment or the actual loss of property for there to be constitutionally significant duress.

Thus, the Commissioner's unilateral choice after *Davis* not to prosecute retirees or impose summary remedies is irrelevant in determining whether retirees faced these risks at the time the tax was due.

Further, the Respondents cannot escape that, in spite of *Davis*, they immediately imposed the penalty and interest on those federal retirees who did not pay the tax.

At least two state supreme courts have found that less severe sanctions constitute duress under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). The Iowa Supreme Court concluded that:

> [W]e are convinced that, by *McKesson* standards, tax payment in Iowa continues to be less "voluntary" than "under duress." [citations omitted]

[15] *Fowler v. Strickland*, 243 Ga. 30, 33, 252 S.E.2d 459, 461 (1979).

> For example, Iowa Code section 422.25(2) provides a penalty of seven and one-half percent for failure to pay ninety percent of the tax due when filing the return. *See also* Iowa Admin. Code 10.41(3), (5) (adjusting computation of penalty under section 422.25(2) depending on taxable year). Section 422.26 grants the state a tax lien on all of a taxpayer's property for failure to pay assessments when due. And, of course, interest accrues on all unpaid taxes at a rate tied to the prime. *See* Iowa Code § 421.7(2).

Hagge v. Iowa Dep't of Revenue and Finance, 504 N.W.2d 448, 451 (Iowa 1993).

Similarly in *Service Oil, Inc. v. North Dakota*, 479 N.W.2d 815, 822 (N.D. 1992), the court held that a 5% fine, 12% annual interest and the possible loss of a business license constituted duress.

Finally, the Respondents and their amici do not claim that the sanctions imposed in this case should be withdrawn, that they were imposed by mistake, or that they were imposed by inadvertence. Rather, the Respondents and their amici argue that these sanctions are necessary. The Respondents suggest that these sanctions are "reasonable measures designed to see that taxes are paid that are legally owed." Brief for Respondents, p. 27. Amici Curiae Alabama, *et al.* argue that states "must be able to include financial sanctions." Brief of Alabama, *et al.*, pp. 9-16. Amici Curiae National Governor's Assoc., *et al.*, argue that without penalties, taxpayers would have every incentive not to pay taxes. Brief of National Governor's Assoc., *et al.*, p. 23. In short, despite the enormous power and resources of the State, Respondents and their amici claim they need special powers to deal with individual taxpayers and that an evenhanded or balanced approach would be "disastrous." Brief of Amici Curiae Alabama, *et al.*, p. 12.

These arguments demonstrate a fundamental misunderstanding of *McKesson*. Unquestionably, financial sanctions and summary remedies are already *permissible* under due process.

McKesson makes this explicit:

> To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies such as distress sales in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 37 (1990).

When a state elects these sanctions, though, *McKesson* obligates the state "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. Thus, McKesson provides the states a choice. States may require a predeprivation process, but it must be free of duress. *Id.* at 32-33, 38 n.21. If states believe sanctions and penalties are necessary, they are free to impose them, but they must then provide post-deprivation relief. If they make this choice, the states retain "freedom to impose various procedural requirements on actions for post-deprivation relief." *Id.* at 45.

Additionally, *McKesson* does not preclude the imposition of penalties for frivolous claims and lawsuits.[16]

All this is not enough for the states though. What the Respondents and their amici seek is a drastic rewrite of *McKesson*. They want to have their proverbial cake and eat it, too. In short, they ask this Court to allow them to extort illegal taxes from their citizens with impunity.

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[16] *See, e.g.*, O.C.G.A. § 51-7-80 (1989 & Supp. 1993).

II. NEITHER SOVEREIGN IMMUNITY NOR EQUITY PRECLUDE REFUNDS.

The Respondents and the Brief of Amici Curiae of the National Governor's Association, *et al.*, assert that sovereign immunity precludes refunds or any other meaningful backward-looking relief in this case. In effect, the Respondents and their amici ask this Court to reverse its unanimous decision in *McKesson*:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

496 U.S. at 31.

According to Amici Curiae National Governor's Association, *et al.*, the entire holding of *McKesson* is predicated on the existence of a state refund remedy which waives sovereign immunity. *See* Brief of Amici Curiae of the National Governor's Ass'n, *et al.*, pp. 6-7. According to these amici, the issue of sovereign immunity was critical to the analysis in *McKesson*, even though it is only referenced indirectly in a single footnote, 496 U.S. at 49, n.34.

The amici ignore this Court's discussion in *McKesson* of several cases where refunds were awarded for unconstitutional taxation. These cases include *Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) and *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931). All of these cases award refunds of illegally collected taxes without regard to sovereign immunity.

As this Court held in *Carpenter, supra*, "A denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." 280 U.S. at 369. The sovereign immunity question has already been answered adversely to Respondents.

Nor can equity be used to defeat Petitioner's claims for refunds. "Equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 183 (1990). "Once a constitutional decision applies [retroactively] and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered." *Id.* at 194; *see also, McKesson*, 496 U.S. at 50.

Equitable considerations may shape the relief awarded, but they may not be used to deny relief altogether. *McKesson*, 496 U.S. at 50. In *McKesson*, the Court remanded for "fine tuning" of the relief and in *Harper*, the state was allowed an opportunity for "the crafting of any appropriate remedy" so long as the "relief satisfies the minimum federal requirements we have outlined." *Harper v. Virginia Dep't of Taxation*, 509 U.S. ——, 113 S. Ct. 2510, 2521 (1993), *citing McKesson*, 496 U.S. at 51-52.

Georgia has already decided that there is no state remedy that provides meaningful backward-looking relief. Moreover, the Georgia Supreme Court has had two opportunities to consider this case in circumstances where it knew *Davis* applied retroactively and it knew *McKesson* set the minimum standards of due process. In both instances, relief was denied.

This case presents the pure question of what are the minimum requirements for the remedy for a due process violation. In *Harper*, this Court indicated that it was

meaningful backward-looking relief to all those adversely effected by the illegal tax.

Petitioner respectfully submits that that is the standard that should be applied in this case. Further, given the extended passage of time, interest should be included. This Court has held that a temporary taking of property by the government requires compensation for the value of the property during the time it was taken. *See First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-322 (1987). Here the property taken was money, and the measure of its value during the time it was taken is interest.[17]

III. GEORGIA'S REFUND STATUTE PRECLUDES A FINDING THAT THE REMEDIAL SCHEME WAS CLEAR AND CERTAIN.

Respondents virtually ignore Petitioner's assertion that Georgia's remedial scheme was not clear and certain because it provided a plain post-deprivation remedy that was eliminated after the time for any other remedy had passed. The Respondents' strategy is understandable since they do not and cannot dispute that, until *Reich I* was decided in November 1992, Georgia's refund statute provided an unqualified right to refunds of illegal taxes.[18]

Rather than challenge this point on the merits, the Respondents suggest that this is an issue this Court has declined to hear. Brief for Respondents, pp. 38-41. Petitioner's Petition for Writ of Certiorari sought review of two questions, and this Court declined to hear the second question. As briefed in the Petition, this first question included the same argument regarding the refund statute

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[17] Georgia law provides for interest on tax refunds at 9% simple interest (O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993). It also provides prejudgment interest on liquidated claims at 7% simple interest (O.C.G.A. § 7-4-15 (1989)).

[18] *See* Brief for Petitioner, pp. 26-29.

discussed on pages 26-29 of Petitioner's brief on the merits. The second question raised the issue of whether the refund statute created a separate property interest protected by due process. Petition for Writ of Certiorari, pp. 19-25. This is a distinct question from whether the refund statute rendered the entire scheme violative of *McKesson* because it was a remedy plainly available until 1992. This latter point was recently addressed by the Minnesota Supreme Court in *Cambridge State Bank v. James*, 514 N.W.2d 565, 571 (Minn. 1994):

> To rely on the banks' use of the refund statute to now deny them a remedy would effectively deny the banks a meaningful hearing without adequate notice. Prior to the *McKesson* decision, taxpayers had no notice that they were required to take advantage of any predeprivation procedures in order to qualify for a refund. Even if there was a predeprivation remedy in 1980, the banks did not know when they chose between filing for a refund in district court and filing in tax court, that in choosing a refund action, they were foreclosing their right to recovery. Moreover, the tax refund statute did not have a requirement that the tax be paid under protest or that the taxpayer attempt to first take his or her claim to tax court.

For this and other reasons, the Minnesota court concluded that the requirements of *McKesson* were not satisfied and ordered refunds.

For federal retirees in Georgia, the refund statute was a viable remedy with a three-year limitation period. By relying upon and following this statute, they had no way of knowing they were foreclosing all right to relief. As in *Cambridge State Bank*, the requirements of *McKesson* and *Harper* are not met under these facts.

Respectfully submitted,

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